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SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1965

No. 985

COLONIAL PIPELINE COMPANY,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Dated: May 9, 1966

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PAGE

TABLE OF CONTENTS

	Page
I. Introduction	1
II. Retroactivity	2
II. Commercial Domicile	5
V. Conclusion	8

TABLE OF CITATIONS

Cases

Blodgett v. Holden, 275 U.S. 142 (1927)	3
Cohan v. Commissioner, 39 F. 2d 540 (2d Cir. 1930)	4
Commissioner v. Sullivan, 356 U.S. 27 (1958)	4
Commonwealth v. Colonial Pipeline Co., 1963 S. C. C. Va. Rep. 83	2
Cooper v. United States, 280 U.S. 409 (1930)	3
Cream of Wheat Co. v. Grand Forks County, 253 U.S. 325 (1920)	6
Curry v. McCanless, 307 U.S. 357 (1939)	5
Greenough v. Tax Assessors, 331 U.S. 486 (1947)	6
Newark Fire Insurance Co. v. State Board, 317 U.S. 313 (1939)	6
Penn-Dixie Cement Corp. v. Kizer, 194 Tenn. 412, 250 S.W. 2d 904 (1952)	4
Philip Wagner, Inc. v. Leser, 239 U.S. 207 (1915)	4
Prather v. Commissioner, 322 F. 2d 931 (9th Cir. 1963)	4
Standard Oil Co. v. Kentucky, 311 S.W. 2d 372 (Ky. 1958)	6, 7
State Tax Commission v. Aldrich, 316 U.S. 174 (1942)	6

Page

Texas v. New Jersey, 379 U.S. 674 (1965) 7

United Business Corp. of America v. Commissioner, 62 F. 2d 754 (2d Cir. 1933) 4

United States v. Hudson, 299 U.S. 498 (1937) 4

Untermyer v. Anderson, 276 U.S. 440 (1928) 3

Welch v. Henry, 305 U.S. 134 (1938) 3

Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936) 6, 7

Wilgard Realty Co. v. Commissioner, 127 F. 2d 514 (2d Cir. 1942) 4

Other Authorities

Virginia Code (1950):

§ 58-411 5

§ 58-415 5

Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960) 3

BRIEF IN OPPOSITION TO MOTION TO DISMISS

I

INTRODUCTION

The document filed on behalf of the Appellee in this case is not directed to the absence of a Federal question or to the fact that the Federal questions presented are not substantial. It is, in essence, a brief on the merits of the case. Although an effort will be made to reply to the document as if it were a motion, it will inevitably be necessary to focus more strongly on the merits of the case than is customary at this stage.

A few comments are, we believe, necessary as to the coloring material contained in the Motion. For example, the Appellee sets its tone by referring to the Appellant as "a huge corporation" (Motion, p. 5) that undertook a "vast program" (*Id.* at p. 7). Hopefully, the size of a corporation is not the standard by which the gluttony of tax gatherers is to be measured in Virginia. The public records of the State Corporation Commission of Virginia show that property owned in Virginia by other utilities is of much greater value than that of the Appellant; several have property assessed for taxation at amounts ten to twenty times that of the Appellant. The table on page 6 of the Motion makes these facts clear. All other utilities own property assessed at 88 times that of the Appellant; yet the Appellant paid a tax on intangible property that was equal to 92% of the taxes paid by all other utilities including railroads and a tax on money that was equal to 57% of the taxes paid by all other utilities including railroads. The figures used by the Appellee leave no doubt that, in relation, the Appellant is small but its taxes are large.

Next, the Appellee asserts that, because the State Cor-

poration Commission of Virginia held in October 1963 that it had

> ". . . no authority to regulate or tax petroleum pipeline companies."[1]

the Appellant should have known that such authority would be later conferred on it. The Appellee attempts to bolster this conclusion by excursions into facts far outside the record of this case (Motion, pp. 7-11). But the facts cited by the Appellee lead to the opposite conclusion, for the Appellant thought the matter at rest after the Commission acted. And the record of this case is directly to the contrary of the conclusion advanced by the Appellee (R. 15-16).

Of course, later on (Motion, p. 15), the Appellee calls the reasonable expectation of the Appellant "wholly immaterial". But it is, we submit, a relevant circumstance in measuring a retroactive tax against the Fourteenth Amendment. To that point, we now turn.

II

RETROACTIVITY

The Appellee disagrees with the proposition that was advanced by the Appellant that a retroactive tax is unconstitutional when its imposition could not have been reasonably anticipated and, had it been, the tax would have been legally avoided. The Appellee says:

> "We believe that such anticipation by the taxpayer is wholly immaterial to the issues presented in this case." (Motion, p. 15)

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[1] *Commonwealth* v. *Colonial Pipeline Co.*, 1963 S.C.C. Va. Rep. 83, 84.

Yet that is the rule established by Hochman and quoted by both the Appellant and the Appellee.[2] And it is the basis for the decision by this Court in the gift tax cases.[3] It was the fact that the tax could not reasonably have been anticipated that made the statute offensive to constitutional limitations.

The Appellee then seeks to imply that the gift tax cases have been overruled by *Cooper* v. *United States,* 280 U.S. 409 (1930). That case does *not* involve a gift tax; it involves the income tax, the income tax basis of property received as a gift. That is clear from the quotation from the opinion of this Court that is contained in the Motion (p. 16).

The income tax cases are entirely distinguishable from this case on their facts. Income taxes are revised annually, and no taxpayer can reasonably say that he does not anticipate changes in the income tax statutes during the course of the tax year. But even more than that, a taxpayer has no acceptable alternative to payment of the tax. One does not forego income simply because it may be taxed at a higher rate; for that reason, an income tax may properly have retroactive aspects. That is the rule of *Welch* v. *Henry,* 305

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[2] Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harv. L. Rev. 692, 706 (1960), Statement as to Jurisdiction, p. 9, Motion 1, pp. 18-20.

[3] *Blodgett* v. *Holden,* 275 U.S. 142 (1927); *Untermyer* v. *Anderson,* 276 U.S. 440 (1928). One is struck by certain comments made in the Motion. As to these cases, the Appellee says:

> ". . . the statutes have been applied to transactions (gifts) which have been consummated and the property vested thereby years and years before the legislation was enacted. . . ." (Motion, p. 13).

In *Blodgett* the gift was made in January, 1924; in *Untermyer* the gift was made on May 23, 1924. In each case, the unconstitutional statute became effective on June 2, 1924.

U.S. 134 (1938). If the taxpayer has a reasonable expectation that the transaction will be taxed when he engages in it,[4] or if he is given a chance to avoid the tax and fails to avail himself of it,[5] or if he would not have changed his course of action had he anticipated the tax,[6] then the tax may be retroactively imposed.

But in this case, the Appellant had no way to anticipate imposition of the tax. Had it anticipated the tax, it would have avoided the tax by investing its funds in Federal bonds, notes and bills which are not subject to the tax. When the tax was in fact levied, it was not provided with any means that it could use to avoid or minimize the tax.

The Appellee seeks to align this case with the income tax cases by asserting:

> "The General Assembly of Virginia always meets after January first. Nevertheless it revises the tax structure of Virginia so as to relate back to that date." (Motion, p. 11)

This is, in fact, just what the General Assembly of Virginia does *not* do. It almost never *levies* a tax retroactively.[7] Any implication that the Appellant should have anticipated

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[4] *United States* v. *Hudson*, 299 U.S. 498 (1937); *Wilgard Realty Co.* v. *Commissioner*, 127 F. 2d 514 (2d Cir. 1942).

[5] *Cohan* v. *Commissioner*, 39 F. 2d 540 (2d Cir. 1930); *United Business Corp. of America* v. *Commissioner*, 62 F. 2d 754 (2d Cir. 1933); *Prather* v. *Commissioner*, 322 F. 2d 931 (9th Cir. 1963).

[6] *Philip Wagner, Inc.* v. *Leser*, 239 U.S. 207 (1915). In this category also falls *Penn-Dixie Cement Corp.* v. *Kizer*, 194 Tenn. 412, 250 S.W. 2d 904 (1952), which involved the retroactive rescission of a deduction. This is entirely different from the imposition of a new tax. *Cf. Commissioner* v. *Sullivan*, 356 U.S. 27 (1958).

[7] A review of all tax statutes adopted by the General Assembly of Virginia from 1956 through 1964 reveals that no new tax was levied retroactively during this period. The only retroactive tax legislation

this tax because of comparable impositions by Virginia in the past cannot be supported within or outside the record.

The facts are very simple. The Appellant did not anticipate and could not have anticipated the tax.[8] Had it been sufficiently clairvoyant to have anticipated the tax, it would have avoided it. The failure to give it this opportunity for avoidance—an opportunity accepted by all other utilities—raises a very substantial question under the Fourteenth Amendment. That is a question that this Court should determine.

III

COMMERCIAL DOMICILE

The Appellee bases its argument in regard to this question on the fact that, in many cases, double taxation of intangibles does not offend constitutional limitations. Of course, this is true. But this case involves a factual situation where constitutional limitations are offended.

The Appellee places chief reliance on the dictum in *Curry* v. *McCanless*, 307 U.S. 357, 368 (1939), that the State of incorporation may impose on its corporation a tax measured by all of its intangibles (Motion, p. 23). But it is only

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related to income taxes and conferred benefits on taxpayers in general terms except:

(a) a statute changing the date for the payment of gift taxes that was made applicable to the current year but in fact required payment after its effective date; and

(b) a statute exempting certain businesses from the tax on capital.

The only other exception is the statute at issue in this case.

[8] If the statute had not been amended to impose the tax, the Appellant's intangible personal property and money would have been taxed only as capital and only to the extent that it had not acquired a business situs outside Virginia. Virginia Code, §§ 58-411, 58-415. The amount subject to this Virginia tax would have been $1,000 (R. 40).

fair, we consider, to point out again that this statement received the concurrence of less than a majority of the sitting Justices. Mr. Justice Reed specifically refused to agree with this conclusion (307 U.S. at p. 374). The language so sharply relied on by the Appellee was not the language of this Court.

In *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193 (1936), this Court held that intangibles that had acquired a commercial domicile in West Virginia could be taxed by West Virginia even though their owner was incorporated by Delaware. In *Cream of Wheat Co.* v. *Grand Forks County*, 253 U.S. 325 (1920), this Court held that a State of incorporation might tax intangibles of its corporation wherever located. But the matter of commercial domicile in another State was not raised in that case and has not been found in any similar case more recently decided. The taxpayer attempted to prove commercial domicile outside New Jersey in *Newark Fire Insurance Co.* v. *State Board*, 307 U.S. 313 (1939), but this Court found as a fact that it failed to do so:

> "The facts presented by this record fall far short of this requirement." (*Id.* at p. 321)

State Tax Commission v. *Aldrich*, 316 U.S. 174 (1942), was a transfer tax on an individual, not a property tax on a business. And that is equally true of *Greenough* v. *Tax Assessors*, 331 U.S. 486 (1947), where the tax was levied on the property of a trustee, and only on his proportionate share of the property at that.

The Appellee seeks to explain away *Standard Oil Co.* v. *Kentucky*, 311 S.W. 2d 372 (Ky. 1958), simply on the ground that Kentucky is out of step with the world. The

only difference pointed out by the Appellee (Motion, p. 29) between that case and this is that, in *Standard Oil*, the intangibles arose from operations while here the intangibles arose in preparation for the commencement of operations. But that, we submit, is a distinction without a difference. The Kentucky court thought that intangibles with a business situs outside Kentucky could not be taxed by Kentucky. Commercial domicile presents a stronger case than mere business situs. It is clear from the Stipulation of Facts in this case that the commercial domicile of the intangibles of the Appellant was, within the *Wheeling Steel* definition, located in Georgia (compare R. 38-39 with 298 U.S. at pp. 205-206).

It will not do to dismiss *Standard Oil* merely on the ground that the Court of Appeals of Kentucky had not read the decisions of this Court during the preceding decade. *Standard Oil* presents a factual situation more nearly similar to the facts presented here than any other case that has been found. The Kentucky court held that mere incorporation in Kentucky did not justify Kentucky taxation of intangible "property located outside the State. . . ." (311 S.W. 2d at p. 376). That same ruling should bind Virginia. The failure of the Virginia court to recognize the Kentucky rule brings about a conflict between the highest courts of two States that deserves this Court's attention and action.

Finally, the Appellee enumerates at some length the great benefits that Virginia has conferred on the Appellant (Motion, p. 32). The Appellant has conferred a number of benefits on Virginia, especially in business development and taxable values of physical property. Insofar as these intangibles are concerned, the only benefit that Virginia has conferred on the Appellant is to levy the taxes at issue in this case, a benefit that the Appellant would gladly forego. The protec-

tion of the property subject to the taxes at issue here is derived from the law of Georgia.

If Virginia may tax all of these intangibles here, so may Delaware, the second State of incorporation, and so may Georgia, the commercial domicile of the intangibles. To permit Virginia to levy this tax "would too greatly exalt a minor factor"—place of incorporation. *Texas* v. *New Jersey*, 379 U. S. 674, 679-80 (1965). The *Standard Oil* rule denies Virginia's power to tax; this Court should review this case to enforce that rule in Virginia.

IV

CONCLUSION

The Appellee urges that it has not treated the Appellant unfairly (Motion, p. 35). This conclusion is sharply at variance with the facts. The facts recited on page 7 of the Statement as to Jurisdiction make the unfairness of Virginia's treatment of the Appellant manifest for all to see.

But that is not alone a reason for review by this Court. This case places in issue two substantial questions of constitutional law. These questions cannot be obscured by verbiage nor can they simply be disregarded. They remain questions of importance, questions that merit full consideration by this Court.

The motion to dismiss should be denied. Probable jurisdiction should be noted.

Respectfully submitted,

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